Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

No. 78-222

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE BOARD OF EDUCATION FOR THE CITY OF VALDOSTA, GEORGIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. This litigation began in 1971, when the United States filed suit seeking to desegregate the school system of Valdosta, Georgia. As a result of that suit, steps were taken to dismantle the dual system that had previously been in existence in Valdosta. In 1976, the United States filed a motion for supplemental relief, seeking a further order directed to desegregating three elementary schools that still had an almost completely black enrollment and one elementary school that was still almost totally white (Pet. App. 2c-3c).

The district court denied the motion for supplemental relief (Pet. App. 1c-6c) on the ground that the school system had adhered strictly to the guidelines established

by the court's original 1971 desegregation order (Pet. App. 3c) and, therefore, that it had operated a unitary school system since 1971 (Pet. App. 5c). The court concluded that the school board's affirmative duty of desegregation had been satisfied and that any continuing racial "imbalance" in the school was not attributable to any action or inaction on the part of the school board, but to changing housing patterns and the desire of the students to continue attending the schools they were attending (Pet. App. 5c).

The court of appeals vacated the district court's order and remanded the case for further consideration (Pet. App. 1a-5a). The court noted that the continued presence of one-race schools in a system with a history of segregation is constitutionally suspect (Pet. App. 3a-4a). The presence of several such elementary schools in Valdosta, the court held, indicated that it had never achieved a unitary school system, even after the implementation of the 1971 desegregation order (Pet. App. 3a-5a). The court directed the parties and the district court on remand to develop a desegregation plan designed to alleviate the "high incidence" of racially identifiable elementary schools (Pet. App. 4a-5a).

2. The court of appeals did not finally dispose of the motion filed by the United States; it merely remanded the case for further consideration by the district court. In the absence of extraordinary circumstances, this Court has declined to review non-final orders issued by the courts of appeals. See, *e.g.*, *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Co.*, 389 U.S. 327. There is no reason to depart from this practice here, particularly since the court of appeals did not order any specific form of relief or otherwise confine the district court's exercise of discretion, beyond stating

that the district court "should give further consideration to the steps necessary to create a unitary school system in Valdosta" (Pet. App. 5a).

3. In any event, the court of appeals' ruling is correct. Implementation of the 1971 desegregation plan did not establish a unitary system. As a result of that plan, as the court of appeals concluded, progress was made toward elimination of the vestiges of the dual school system, but not all the effects of state-imposed segregation were removed. These effects must be removed before any school system may be declared unitary. *Green* v. *County School Board*, 391 U.S. 430, 439.

This Court held in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26, that "in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." The continued existence of all-black or all-white schools previously so designated under a dual system requires close judicial scrutiny and places the burden on school board officials to establish that the racial composition of these schools is not a product of past or present discrimination by school authorities (*ibid.*). In this case, four of the system's six elementary schools that were racially identifiable in 1970 remained so in 1976 (Pet. App. 4a). From this six-year experience, it was evident that the previously acquired racial identity of those schools could not be overcome simply by following a policy of facially neutral school assignments. In this context, the court of appeals properly concluded that petitioner's facially neutral pupil assignment plan did not constitute "full performance of the school board's duty to eradicate the dual school system" (Pet. App. 5a).

The court of appeals' ruling is consistent with other post-*Swann* decisions in similar cases; this Court has repeatedly declined further review in these cases. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F. 2d 878 (C.A. 5), certiorari denied, 410 U.S. 966; *Hereford* v. *Huntsville Board of Education*, 504 F. 2d 857 (C.A. 5), certiorari denied *sub nom. Huntsville Board of Education* v. *United States*, 421 U.S. 913; *United States* v. *Texas Education Agency*, 512 F. 2d 896 (C.A. 5), certiorari denied *sub nom. Richardson Independent School District* v. *United States*, 423 U.S. 837; *United States* v. *Columbus Municipal Separate School District*, 558 F. 2d 228 (C.A. 5), certiorari denied, 434 U.S. 1013; *Lee* v. *Demopolis City School System*, 557 F. 2d 1053 (C.A. 5), certiorari denied, 434 U.S. 1014.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1978

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[1]The decision in this case does not conflict, as petitioner claims (Pet. 4-5), with the decision of the Sixth Circuit in *Higgins* v. *Board of Education for the City of Grand Rapids*, 508 F. 2d 779. In *Higgins*, the court upheld the district court's finding that any segregation in the Grand Rapids school system was not the result of any intentional official action. The court distinguished cases in which desegregation had been officially required in the past, as in Valdosta. 508 F. 2d at 792. Since, as the court of appeals stated, "we cannot conclude that Valdosta has fully eliminated its dual school system" (Pet. App. 3a), further relief was properly required.

DOJ-1978-09